85-667

No.

Supreme Court, U.S.
FILED
OCT 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MONARCH LONG BEACH CORP.,
Cross-Petitioner,

v.

SOFT DRINK WORKERS, LOCAL 812, etc., *et al.*,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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25 pp

QUESTION PRESENTED

Monarch Long Beach Corp. ("Monarch") set forth two causes of action in its complaint filed in the United States District Court for the Eastern District of New York; one arising pursuant to § 303 of the LMRA, 29 U.S.C. § 187 and a pendent state claim alleging a violation of the common law and public policy of the state of New York. The question presented is:

> (1) Whether state law is preempted by federal labor law if a union's conduct, in effect, constitutes the imposition of a private embargo of the importation of out-of-state goods into the state.

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IN THE

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No.

MONARCH LONG BEACH CORP.,
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v.

SOFT DRINK WORKERS, LOCAL 812, etc., *et al.*,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Monarch Long Beach Corp., plaintiff-appellant in the courts below, hereby cross-petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that court's decision and judgment in *Monarch Long Beach Corp.* v. *Soft Drink Workers*, 762 F.2d 228 (C.A. 2 No. 84-7866, 1985), insofar as that decision and judgment affirms the district court's dismissal of Monarch's pendent state claim (count II) based upon preemption.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 762 F.2d 228, and is reproduced in the Appendix to the Cross-Respond-

ents' Petition for a Writ of Certiorari ("Cross Resp. App.") at pp. 1a-8a. The opinion of the United States District Court for the Eastern District of New York is reported at 593 F.Supp. 384 and is reproduced at Cross Resp. App. 9a-12a.

JURISDICTION

The decision of the court of appeals was rendered on May 20, 1985. On July 31, 1985, Justice Marshall signed an order extending the time for the cross-respondents to file their petition to and including September 17, 1985. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. § 187(b).

The cross-petitioner received the cross-respondents' petition for a writ of certiorari (No. 85-466) on September 20, 1985 and files this cross-petition pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

This case involves §§ 8(b)(4) of the National Relations Act of 1935 ("NLRA"), 49 Stat. 449, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136 ("LMRA") and the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 ("LMRDA") and also involves § 303 of the LMRA, as amended by the LMRDA.

STATEMENT OF THE CASE

This case arises out of the activity of Soft Drink Workers, Local 812 ("Local 812") in picketing and handbilling Monarch Long Beach Corp. ("Monarch") from March 27, 1978 until August 25, 1978. Cross Resp. App. 2a-3a.

The cross-petitioner is a New York Corporation engaged in the wholesale and retail sale of soft drink beverages, beer and ice. Local 812 is a labor organization which represents, in the main, workers in the soft drink manufacturing industry in the New York metropolitan area and other counties in the State of New York.

Due to the very high cost of doing business in the New York metropolitan area, the soda manufacturers within the cross-respondents' geographical area of jurisdiction began to suffer a serious loss of business in 1977 and 1978, and, as a result, a large number of Local 812 members lost their jobs. Cross Resp. App. 2a. In response, Local 812 surveyed retail outlets within its geographical jurisdiction and discovered that a substantial amount of soda sold at retail was shipped from outside the area. Cross Resp. App. 2a. In fact, the cross-petitioner purchased most of the soda it sold from out-of-state manufacturers. Cross Resp. App. 2a.

On March 27, 1978, without notice or warning, Local 812 began picketing the cross-petitioner's retail store to force the cross-petitioner to cease purchasing beverages manufactured outside Local 812's geographical jurisdiction and to urge Monarch's customers to buy locally produced soft drinks. Such picketing continued until August 25, 1978.

On April 7, 1982, Monarch filed unfair labor practice charges against Local 812 with the National Labor Relations Board ("NLRB" or "the Board"). Cross Resp. App. 2a. The NLRB found that Local 812 had violated § 8(b)(4)(ii)(B), of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(ii)(B), by its activity urging Monarch's customers to buy

locally produced soft drinks, *Soft Drink Workers Union Local 812,* 243 NLRB 801 (1979), and the NLRB's decision was enforced by the United States Court of Appeals for the District of Columbia Circuit. *Soft Drink Workers Union Local 812* v. *NLRB,* 657 F.2d 1252 (1980).

On May 11, 1978, while the unfair labor practice case was pending before the NLRB, the Board sought a preliminary injunction against Local 812 pursuant to 10(l) of the NLRA, 29 U.S.C. § 160(l). The NLRB's petition for a § 10(l) injunction was denied by the United States District Court for the Eastern District of New York on May 30, 1978. Cross Resp. App. 3a.

On June 5, 1978, Monarch commenced an action against Local 812 in the Supreme Court of the State of New York, County of Nassau, seeking injunctive relief and monetary damages pursuant to the clearly defined public policy of the State of New York regarding embargoes. The suit was removed to federal court and then remanded to state court. Cross Resp. App. 3a. That litigation is still pending in the state court.

On August 25, 1981, Monarch filed the complaint in this case. Cross Resp. App. 3a. Count I of the complaint alleged that by engaging in this picketing, Local 812 had violated LMRA § 303, 29 U.S.C. § 187. Cross Resp. App. 1a. Count II of the complaint alleged that the picketing violated New York's common law regarding embargoes. Cross Resp. App. 2a.

The district court held that, under this Court's decision in *DelCostello* v. *Teamsters,* 462 U.S. 151 (1983), the appropriate statute of limitations to be applied in an action filed under LMRA § 303, is that contained in NLRA § 10(b), 29 U.S.C. § 160(b). Cross Resp.

App. 11a. Since § 10(b) provides a six month limitations period, and Monarch's action was filed three years after Local 812 had ceased picketing, the district court dismissed count I of the complaint, which alleged a violation of § 303, as time-barred. Cross Resp. App. 11a. The district court also dismissed the other count of the complaint, ruling that Monarch's state law claim is preempted by federal law. Cross Resp. App. 11a.

Monarch appealed the district court's dismissal of its complaint, and the court of appeals reinstated count I of the complaint. The court of appeals ruled that the limitations period to be applied in an action under LMRA § 303 should be borrowed from the most analogous state law and that "[t]he most suitable state law analogue [to a suit under LMRA § 303] . . . is New York's cause of action for damages to one's business caused by actions in restraint of trade, N.Y. Gen. Bus. Law § 340 (McKinney 1968 & Supp. 1984), which has a four year statute of limitations." Cross Resp. App. 7a. Since Monarch filed its complaint three years after the picketing ended, the court of appeals held that count I, alleging a § 303 violation, was timely under the four-year limitations period borrowed from New York law. The court of appeals agreed with the district court that the pendent state law claim advanced by Monarch in count II of its complaint is preempted by federal law. Cross Resp. App. 7a. The court of appeals therefore reversed the district court's dismissal of count I, affirmed its dismissal of count II, and remanded the case for further proceedings. Cross Resp. App. 8a. The corss-respondents have filed a petition for a writ of certiorari to review the United States Court of Appeals for the Second Circuit's decision and judgment as to count I. The cross-petitioner, Monarch

Long Beach Corp., files this cross-petition for a writ of certiorari to review the United States Court of Appeals for the Second Circuit's decision and judgment as to count II.

REASONS FOR GRANTING THE WRIT

Local 812's picketing and other coercive activities were intended to force Monarch to stop its sale, within the Union's geographical jurisdiction, of beverages which are manufactured, processed and/or handled outside of its geographical jurisdiction. Such action, in effect, constitutes a private embargo upon Monarch's purchase of beverages from localities outside of the Union's geographical jurisdiction.

A private embargo of out-of-state foodstuffs entering into the State of New York is deeply rooted in New York's interest in protecting the flow of goods into New York. Therefore, the preemption doctrine is inapplicable to the instant case since state law should not be preempted when the conduct in question touches on interests deeply rooted in local feeling and responsibility. *See Local 926, International Union of Operating Engineers* v. *Jones,* 460 U.S. 669 (1983). Therefore, we respectfully contend that the court of appeals should not have affirmed the district court's dismissal of count II based upon the preemption doctrine.

I. The Union's Conduct In The Instant Case Gives Rise To A Cause Of Action Subject To State Regulation And Public Policy And Is Not Preempted By Federal Labor Law.

A. The cross-petitioner set forth two causes of action in its complaint filed in the United States District Court for the Eastern District of New York; one arising pursuant to § 303 of the LMRA and the other, a

pendent state claim alleging a violation of the common law and public policy of the state of New York in that the object of Local 812's conduct was to effect a private embargo of out-of-state foodstuffs entering into the State of New York.

The general rule is that state law is "ordinarily" preempted when the conduct in question is "arguably prohibited or protected" by federal labor law. *Local 926, International Union of Operating Engineers* v. *Jones, supra,* 676. *San Diego Unions* v. *Garmon,* 359 U.S. 236, [illegible].

However, in *Local 926,* this Court warned against application of such a test in "literal, mechanical" fashion. *Local 926, supra,* at 676. *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180, 188 (1978). The court did not support an approach which swept away state court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected. *Sears, Roebuck & Co.* v. *Carpenters, supra,* at 188.

The Court in *Local 926* aptly noted:

> When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct.

Local 926, supra, at 676.

In *Sears, Roebuck & Co.* v. *Carpenters, supra,* this Court established an appropriate test as to whether

an action cognizable and regulated by a state is preempted by federal labor law:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not presented to the Labor Board.

Id., at 197.

The policies and issues which were presented to the National Labor Relations Board ("NLRB") and the United States Court of Appeals for the District of Columbia Circuit concerning Local 812's violation of § 8(b)(4)(B) are substantively different than those set forth in count II of the plaintiff's complaint which were presented to the courts of the State of New York, the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit.

The federal policy of protecting neutrals from being dragged into "labor" disputes not of their own making is embodied in the provisions of § 8(b)(4)(B) of the NLRA, 29 U.S.C. § 158(b)(4)(B). At issue before the NLRB was whether Monarch was a neutral secondary employer and whether the union's picketing was in any way protected by the *"Tree Fruits"* doctrine.[1]

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[1] In *NLRB* v. *Fruit & Vegetable Packers and Warehousemen, Local 760,* 377 U.S. 58 (1964) this Court held that picketing of a retail store directed solely at consumers is not prohibited secondary activity if it adequately identifies the product or products that are being boycotted. In *Soft Drink Workers* v. *NLRB,* 657 F.2d 252 (D.C. Cir. 1980), the U.S. Court of Appeals affirmed the decision of the NLRB that the union did in fact violate § 8(b)(4)(B) of

At issue in count II of the complaint was whether or not the union violated the common law and public policy of the State of New York.

B. A finding of the violation of the public policy of the State of New York as set forth in *Barclay's Ice Cream Co.* v. *Local No. 757,* 51 A.D.2d 516, 378 N.Y.S. 2d 935 (1976) *aff'd* 41 N.Y.2d 269, 392 N.Y.S.2d 278 (1977) *on remittitur* 42 N.Y.2d 870, 399 N.Y.S.2d 793 (1977) *cert. denied* 436 U.S. 925 (1978), is completely unrelated to any finding of whether the plaintiff is a "primary" or neutral "secondary employer" and whether or not the picketing was "protected activity" under the *Tree Fruits* doctrine. This cause of action arises out of New York State's deeply rooted interest in prohibiting the imposition of private embargoes on the importation of foodstuffs into New York. See *Mayer Bros. Poultry Farms* v. *Meltzer,* 80 N.Y.S.2d 874 (1948). Because New York's interest in protecting the flow of goods into New York is great and the federal labor laws do not regulate this form of embargo at all, the New York Court of Appeals has held that the "preemption" doctrine does not apply and that the State's courts have jurisdiction to hear actions based on this form of tort.

In *Barclay's,* the plaintiff was a New Jersey Corporation engaged in the wholesale distribution of ice cream to customers in New Jersey and New York. It

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the Act. Although there was "no labor dispute" between the cross-respondents and any identifiable employer, the NLRB found, among other things, that Monarch was a neutral "secondary" employer and found the failure of the union to identify the "offending" goods violated the Act by taking their conduct outside the protection of *Tree Fruits.*

obtained its product from manufacturers in Pennsylvania and Ohio. Local 757 represented employees engaged in the manufacture of ice cream in New York City.

The defendant attempted to convince Barclay's to purchase all of its ice cream from the New York manufacturers employing Local 757 members. Being unsuccessful, Local 757 made known its intention to conduct a consumer boycott by picketing retail stores in New York where ice cream distributed by Barclay's was sold and by handing out literature urging customers not to buy Barclay's products. The sole objective of Local 757 in attempting to effect such a private embargo was to "protect members' jobs," i.e., by compelling Barclay's to purchase locally produced ice cream rather than that manufactured in Pennsylvania and Ohio.

In *Barclay's,* the plaintiffs commenced an action in state court alleging that Local 757 was attempting to engage in a proscribed embargo. Accordingly, as the complaint alleged a violation of state law, the United States District Court for the Southern District of New York (Bonsal, J.) granted Barclay's motion for remand upon Local 757's removal of the action.

The Appellate Division rejected Local 757's preemption arguments. In reviewing the cause of action before it, namely, that alleging the establishment of a private embargo, it stated that "if this were an unfair labor practice case . . . determination in the first instance would have to be left to the National Labor Relations Board." However, the action in *Barclay's,* like count II of the complaint herein, was not an "unfair labor practice case" as it alleged merely a violation of state, not federal law.

In *Barclay's,* the Appellate Division of the Supreme Court of the State of New York recognized that the defendants' activities were not prohibited by federal law pursuant to the *Tree Fruits* doctrine. See *Barclay's Ice Cream Co., supra,* 378 N.Y.S.2d at 397. As the picketing in Barclay's was not prohibited by federal labor law, had Barclay's filed charges with the NLRB, no violation of federal law would have been found and the picketing would not have been enjoined. This consideration did not bar relief in the New York court. Nonetheless, the Appellate Division rejected Local 757's preemption argument.

On appeal to the New York Court of Appeals, Local 757 once again argued preemption. The New York Court of Appeals rejected the claim. *Barclay's Ice Cream Co., supra,* 41 N.Y.2d 269, 272 (1977):

> "The remand to our State courts by the United States District Court for the Southern District of New York, following the union's removal of this case to the Federal Court, forecloses the contention that State court action is precluded because there is jurisdiction in the Federal Court."

The New York Court of Appeals found that the activity (imposition of a private embargo of foodstuffs entering into New York) was "merely a peripheral concern of the Labor Management Relations Act" and thus not preempted. It specifically found the imposition of such an embargo, solely to promote the economic interest of the members of a union, to be an "unlawful purpose contrary to the public policy of this State." *Barclay's Ice Cream, supra,* 41 N.Y.2d at 273; *Mayer Bros. Poultry Farms* v. *Meltzer, supra.*

Except for the fact that Monarch filed a charge with the NLRB and subsequently filed a state court action

pursuant to *Barclay's* after the United States District Court refused to issue an injunction application by the NLRB pursuant to 29 U.S.C. § 10(l), this case is exactly like *Barclay's*. As in *Barclay's*, Local 812 removed the action to the federal court and the case was remanded to the state court by the United States District Court for the Eastern District of New York (Constantino, J.) because it stated a cause of action "solely in state law." Cross Pet. App. 1a. Upon Monarch's application, a preliminary injunction was issued by the New York State Supreme Court for the County of Nassau (Levitt, J.) Cross Pet. App. 2a-3a. As in *Barclay's*, the union appealed to the Appellate Department of the Supreme Court of the State of New York. Its appeal was rejected unanimously. *See Monarch Long Beach Corp.* v. *Soft Drink Workers, Local 812*, 409 N.Y.S.2d 661 (1978). Cross Pet. App. 4a.

C. Local 812 argues that by pursuing a cause of action under federal law, Monarch is now foreclosed from litigating its action based on a violation of state law. Such a return to the long discredited "election of remedies" doctrine would be erroneous. It must be remembered that, while Monarch's two causes of action arise from a common nucleus of operative fact, they are separate and distinct causes.

That a charge has been filed and processed here does not alter the *Barclay's* analysis because the preemption doctrine, if it is to lead to uniformity of regulation, must apply regardless of whether charges of federal violations are filed. Moreover, that a charge has been filed with the NLRB in this case does not alter the facts of the case. The facts are those surrounding the union's picketing, not the actions taken by Monarch to halt them.

The courts in *Barclay's* were fully aware of the secondary boycott aspects of that case and were equally aware of the fact that the only reason that *Barclay's* was not before the NLRB was that the picketing therein fell squarely within the protection of the *Tree Fruits* doctrine. Accordingly, it is clear that the New York Court of Appeals was aware of the fact that in the future, a case just like this one could arise; one in which the conduct of the picket line is not within *Tree Fruits,* yet one which, because it alleges the establishment of a private embargo of non-local foodstuffs, has aspects that are of "peripheral concern" to the federal scheme and are "deeply rooted in local feeling and responsibility." To hold that the cross-petitioner is foreclosed from bringing a state-based cause of action for damages because the conduct at issue is more egregious than that at issue in *Barclay's* would be both anomalous and absurd.

In *Sears, Roebuck & Co.* v. *Carpenters, supra,* this Court ruled that Sears could present its separate causes of action to each appropriate forum, stating:

> "In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create

> no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices."

Id. at 198.

Thus, where the same picketing activity gives rise to two separate causes of action, one grounded in State law and the other under the National Labor Relations Act, and where the legal issues are different ones, then the state action may be pursued despite the concurrent federal claim. This is precisely the situation in this case.

The issues and facts found before the United States Court of Appeals for the District of Columbia Circuit were that Monarch was a neutral secondary employer and that the union's activities did not fall within the *Tree Fruits* doctrine. The issues asserted in count II of the complaint herein are entirely different. The state based cause of action focuses solely on the union's ultimate goal, which was to privately embargo the sale of non-local food products in the metropolitan New York area.

The union's ultimate goal is of no concern to the NLRB. Indeed, for purposes of application of the secondary boycott provisions of federal law, it matters not whether the ultimate goal is to privately embargo goods or to achieve a more traditional (and perfectly lawful) result such as an increase in wages or improvement of working conditions for the employees of the "primary" disputant. Contrariwise, it matters not to the determination of this state cause of action that the picketing was "primary" or "secondary," or that *Tree Fruits* did not apply.

D. The free flow of foodstuffs into the state of New York is a tremendously vital local interest and matter of public policy which should not be preempted by federal law. In *Barclay's,* as here, there was not a "labor dispute" and importantly no recognized legitimate labor union objective. This Court recognized the deeply entrenched public policy of the State of New York by denying certiorari in *Barclay's* and not interfering with such policy. If the court of appeals affirmation of count II is upheld, then future private embargoes, previously contrary to the law of New York, will be able to be imposed against New York State employers based upon the defense of federal preemption, even when the conduct does not amount to secondary boycott activity.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78-C-1209

MONARCH LONG BEACH CORP.,
Plaintiff,

v.

SOFT DRINK WORKERS, LOCAL 812,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
DAVID LEVINGER, individually and as President of
said Local Union; *et al., Defendants.*

MEMORANDUM and ORDER

July 26, 1978

COSTANTINO, D.J.

Plaintiff moves to remand this action to state court. A reading of plaintiff's complaint reveals that it is based solely on state, not federal law. In attempting to obtain removal jurisdiction, defendants rely on defenses based on federal law. "A defense based on federal law, however, will not sustain removal jurisdiction." *New York v. Local 1115,* 412 F. Supp. 720, 722 (E.D.N.Y. 1976) (Neaher, J).

Accordingly, plaintiff's motion to remand is granted. So ordered.

/s/ MARK A. COSTANTINO
U. S. D. J.

APPENDIX B

SUPREME COURT — STATE OF NEW YORK

Present: Hon. Howard E. Levitt, Trial Justice.

SPECIAL TERM, PART 1
NASSAU COUNTY

Index Number 8296, 1978

Motion Date August 2, 1978

Motion Cal. Number 88

MONARCH LONG BEACH CORP.,
Plaintiff,

- against -

SOFT DRINK WORKERS, LOCAL 812,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
et al., Defendants.

Upon the foregoing papers it is ordered that this motion for a preliminary injunction is granted. Plaintiff is a beverage sales corporation in the City of Long Beach. Defendant is a Local of a union that represents Soft Drink Workers. The Local does not represent the employees of plaintiff's store and is not attempting to be recognized nor is it complaining of any working conditions or salaries or any other matter relating to conditions of employment. In essence, no labor disputes exist. Defendant, however, is picketing plaintiff's store and distributing literature urging its customers to buy only locally-produced and bottled soft drinks or beverages. Plaintiff sells other than local products because those from other areas are obtained at less cost.

While the court is hesitant to interfere with defendant's right to disseminate information and to engage in peaceful picketing, it must do so on constraint of *Barclay's* v. *Local No. 757,* 41 NY2d 269; affg. 51 AD2d 516, wherein, as in the instant case, the Local's only interest was to protect the economic interest of members of the Local by coercive economic pressure to force plaintiff to abandon out-of-state suppliers and to turn to local sources. The mere fact that the signs tell customers to buy only locally bottled soda as opposed to telling them not to buy out-of-state soda does not change the fact that they are discouraging purchases.

The Appellate Division rejected the contention that the National Labor Relations Board's exclusive jurisdiction pre-empted the jurisdiction of the state court and granted the injunction pendente lite. The Court of Appeals in affirming stated that "the imposition of such an embargo to promote the economic interest of members of the local union is an unlawful purpose contrary to the public policy of this State; as such it is not beyond the power of the courts to reach and to enjoin."

Accordingly, the injunction sought is granted. The undertaking was fixed at $500.00.

/s/ Howard E. Levitt
J. S. C.

Dated 8-25-78

APPENDIX C

MONARCH LONG BEACH CORP.,
Respondent,

v.

SOFT DRINK WORKERS, LOCAL 812,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
et al., Appellants.

Supreme Court, Appellate Division, Second Department, Oct. 18, 1978. Shapiro, Shiff, Beilly, Castleman & Fox, New York City (Sidney Fox and Gerald Richman, New York City, of counsel), for appellants. Rains, Pogrebin & Scher, Mineola (Martin H. Scher and Paul J. Schreiber, Mineola, of counsel), for respondent. Order of the Supreme Court, Nassau County (Levitt, J.), dated August 25, 1978, affirmed, with $50 costs and disbursements (see *Barclay's Ice Cream Co.* v. *Local No. 757 of Ice Cream Drivers & Employees Union,* 41 N.Y.2d 269, 392 N.Y.S.2d 278, 360 N.E.2d 956, mot. to amend remittitur granted 42 N.Y.2d 870, 397 N.Y.S.2d 793, 366 N.E.2d 880, cert. den. 436 U.S. 925, 98 S.Ct. 2818, 56 L.Ed. 767).

LATHAM, J. P., and DAMIANI, GULOTTA and COHALAN, JJ., concur.